KOREA DEVELOPMENT CORPORATION v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (V.C. George J.) November 22, 1984 & January 4, 1985]

[Kuala Lumpur – Originating Summons No. C178 of 1984]

Revenue Law – Income Tax – Non-resident contractor – Dispute settled by arbitration – Sum paid by defendants – Request by defendants to return 20% – Advance assessment – Declaration – Striking out – Whether relief sought by plaintiffs proper – Income Tax Act 1967, ss. 92, 93, 99, 100, 101 & 107A.

The plaintiffs are a non-resident contractor within section 107A(5) of the Income Tax Act, 1967 (the Act). They contracted with the 1st defendant to complete the Besut Agricultural Development Project. The dispute between them was resolved by arbitration with the 1st defendant paying an agreed sum in full and final settlement of the plaintiffs' claim. The defendants later requested the plaintiffs to return 20% of the sum paid. The plaintiffs did not make payment and asked for a declaration that the amount paid is not liable for the deductions prescribed by section 107A of the Act. The defendants applied to strike out the originating summons.

Held, dismissing the defendant's application with costs: (1) it is only in the plain and obvious cases that recourse should be made to the summary process invoked by the defendants;

(2) the provision in the Act for advance assessments is section 92. Section 107A has no reference to section 92;

(3) the relief sought by the plaintiffs is properly before the court.

Cases referred to:

(1) *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark* [1899] 1 Q.B. 86.
(2) *Attorney General of Duchy of Lancaster* v. *London & N.W. Railway Co.* [1892] 3 Ch. 274.
(3) *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade* [1921] 2 A.C. 438.
(4) *Re Barnato* [1949] Ch. 258.
(5) *Thorne Rural District Council* v. *Bunting* [1972] Ch. 470.

ORIGINATING SUMMONS.

C.V. Das for the plaintiffs/respondents.
Suriyadi Halim Omar (Senior Federal Counsel) for the defendants / applicants.

Cur. Adv. Vult.

V.C. George J.: [On enclosure (5)] It is not disputed that the plaintiffs, Korea Development Corporation, were and are in the context of Malaysia a non-resident contractor within the meaning of section 107A(5) of the Income Tax Act, 1967. In 1972 the plaintiffs as a foreign company and registered as such pursuant to the Companies Act 1965, entered into a contract with the Government of Malaysia to undertake and complete for the Drainage and Irrigation Department of the Government certain civil engineering works known as the Besut Agricultural Development Project.

It was in respect of a cause of action that was alleged to have arisen from that contract that the plaintiffs caused a writ to issue against the Government claiming *inter alia* damages alleged to have been suffered by the plaintiffs. However, the Court proceedings were stayed and the dispute was referred to arbitration and a settlement of the plaintiffs' claim was arrived at when the plaintiffs by their solicitors' letter of March 22, 1984 accepted the Government's offer of M$1,006,497.06 "in full and final settlement of their claims," the amount to be paid within two months of that date which was duly effected when payment was made on or about May 16, 1984 to the plaintiffs through their solicitors.

A few days later, on May 21, 1984, a Senior Federal Counsel from the Attorney General's chambers acting on behalf of the Government contacted the solicitor having the conduct of the matter for the plaintiffs by telephone and made in effect a request that the plaintiffs' solicitors return to the Government 20% of the said amount paid in settlement of the plaintiffs' claims. The Senior Federal Counsel in his letter of May 21, 1984 written on behalf of the Attorney General confirmed the telephone conversation and stated that the deduction was "necessary pursuant to section 107A of the Income Tax Act." The plaintiffs themselves received a letter from the Attorney General's Office stating that the need to make the deduction was "mandatory." This was later followed by a letter dated June 27, 1984 from the relevant Senior Assistant Director of Inland Revenue requiring the plaintiffs' solicitors to arrange to effect payment of the amount to the Income Tax Department.

The payment was not made. Instead the plaintiffs caused this Originating Summons to issue seeking on two different grounds a declaration that the amount paid is not liable for the deductions prescribed by section 107A of the Income Tax Act, 1967.

The defendants having entered an appearance to the Originating Summons have moved the Court

by Summons-in-Chambers [enclosure (5)] which is the matter now before me to have the Originating Summons struck off firstly on the contention that it discloses no cause of action, is frivolous and vexatious and an abuse of process and secondly on the contention that in any event the plaintiffs' remedy is by way of appeal to the Special Commissioners of Income Tax which avenue they have to exhaust before moving the High Court.

Now, it must be borne in mind that it is only in plain and obvious cases that recourse should be made to the summary process invoked by the defendants: *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*[1] per Lindley, M.R. at 91. Also see *Attorney General of Duchy of Lancaster* v. *London & N.W. Railway Co.*[2]

While until 1883, the Common Law Courts had no jurisdiction to make declaratory judgments, in the Court of Chancery binding declarations of rights were always made but only if some right to relief was shown and established. This was changed in England by Order 25 rule 5 of the 1883 Rules of Supreme Court which empowered the Court to make a binding declaration of right whether or not any consequential relief is or could be claimed. See *The Supreme Court Practice* 1979 (Vol. I) 15/16/1. Order 15 rule 16 is the equivalent provision in our Rules of High Court.

Also to be borne in mind is that the power to make a binding declaration of right is a discretionary remedy – *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade.*[3] *Inter alia,* the Court will not generally decide academical or hypothetical questions – *Re Barnato*[4] or where the plaintiff's claim is too indirect or insubstantial and would not give him relief in any real sense *i.e.* relieve him from any liability or disadvantage of difficulty: *Thorne Rural District Council* v. *Bunting.*[5]

In the face of the opinion expressed for and on behalf of the Government in respect of the "mandatory" need to make the deductions it seems to me there is no question but that the plaintiffs have a substantial cause of action that involves issues which are far from being hypothetical or academic and which is of direct interest to the plaintiffs and involves the substantial sum of some $200,000.00. The pursuit of that cause cannot by any stretch be described as frivolous or vexatious or an abuse of the process of Court.

The second ground of complaint by the defendants calls for a perusal of the Income Tax Act with particular reference to Part VI which deals with assessments and appeals and to the sections in Part VII leading up to section 107A.

The Special Commissioners of Income Tax are appointed pursuant to section 98 of the Income Tax Act, 1967. Their powers and duties are specific and are as set out in Chapter 2 of Part VI of the Act which has to be read with Schedule 5 to the Act. Their powers and pursuant to which their duties are clearly limited to appeals against assessments of income tax made by the Director General of Inland Revenue pursuant to the Income Tax Act. It is "a person aggrieved by an assessment made in respect of him" who may appeal to the Special Commissioners [section 99(1)]. Apart from hearing and disposing of appeals against an assessment that had been duly made by the Director General the only other duties that the Special Commissioners have are: (1) to decide, on application, whether to extend the time for appealing where the appeal had not been preferred within the prescribed time [section 100(4)], and (2) to decide, on application, whether to set aside any agreement purported to have been arrived at between the Director General and an appellant on a review of the assessment by the Director General after an appeal had been preferred [section 101(5)].

Now, an assessment against which an appeal may be preferred to the Special Commissioners is an assessment duly made by the Director General pursuant to Chapter 1 of Part VI of the Act. By section 93 it is mandatory that the assessment shall be in the appropriate prescribed form; and shall indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable income and the tax charged thereon or the amount of tax or additional tax, as the case may be; and shall specify in the appropriate space in that form the date on which that form was duly completed.

For the Government it was argued that in the instant case what had happened (in the light of section 107A of the Income Tax Act) tantamounted to there having been an advance assessment from which an appeal lies to the Special Commissioners. It must be recollected that what had happened was that after the Government had effected the payment to the plaintiffs' solicitors of the amount at which the plaintiffs' claim had been settled, a request was made for repayment of 20% thereof that the Government says should have been

deducted by it before the payment was made.

I fail to see how that could amount to an advance assessment. The provision in the Act for advance assessments is section 92 which deals with the circumstances in which the Director General may make what is known as an advance assessment. And an advance assessment has to be made in the manner prescribed by section 93. Section 107A has no reference to any of the circumstances dealt with by section 92. Section 107A is within Part VII of the Act which deals with Collection and Recovery of Tax. Section 107A provides a method of collection of tax which may or may not have been assessed. The Special Commissioners do not have jurisdiction to entertain any appeal or complaint in respect of matters or questions that arise from or in respect of the collection and recovery of tax.

In my judgment the relief sought by the plaintiffs by the Originating Summons is properly before this Court. The application, enclosure (5), is dismissed with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok.*

BALASUBRAMANIAM v. VENKITASAN

[O.C.J. (Shankar J.) January 15, 1985]

[Johor Bahru – Civil Suit No. 194 of 1973]

Contract – Sale of land – Wilful breach by vendor – Measure of damages – Whether on value of land at date of judgment or breach – Interest – Costs – Courts of Judicature Act 1964, s. 16 & Art. 7 of Schedule – Civil Law Act 1956, s. 11 – R.H.C. 1980, O.42, r.12 – Con. tracts Act 1950, s. 74(1).

The sole question for decision in this case is the measure of damages to be awarded to a purchaser arising out of a wilful breach of contract for the sale of land by a vendor, that is whether damages should be assessed based on the value of the land at the date of judgment or at the date on which the breach occurred. The plaintiff contracted in 1969 to purchase a piece of land from the defendant for $2,000. The plaintiff paid $500 on signing the agreement and a further $1,100 on November 4, 1970. These payments were made for a consideration which had wholly failed. On the date of the breach of contract, the land was worth only $1,450.

Held: (1) the market value of the land is to be assessed as on the date on which the breach of contract occurred, following the decision in *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin.*[3] As the land was worth only $1,450 on the date of breach, the plaintiff did not suffer any damages by way of loss of bargain;

(2) the defendant should pay the plaintiff the sum of $1,600;

(3) the defendant should pay interest on $500 from December 26, 1969 to November 4, 1970 and on $1,600 from November 4, 1970 to January 15, 1985 (date of judgment) at 8% per annum and the plaintiff (following agreement on the 70% formula) should receive 70% of this amount in satisfaction of his pre-judgment interest. From judgment till realization interest will run on $1,600 at 8% per annum;

(4) $1,800 fixed by the court as costs in the exercise of its discretion to be paid by the defendant to the plaintiff.

Cases referred to:

(1) *Engell* v. *Fitch* (1869) L.R. 4 Q.B. 659.
(2) *Diamond* v. *Campbell-Jones* [1961] Ch. 22.
(3) *Central Malaysia Development Co. Ltd.* v. *Chin Pak Chin* [1967] 2 M.L.J. 174.
(4) *Rosenthal* v. *Alderton* [1946] K.B. 374.
(5) *Vyramuttu* v. *State of Pahang* (1924) 4 F.M.S.L.R. 277.
(6) *Noordin bin Mat Dom* v. *Yahaya bin Mohamed Jalit* [1952] M.L.J. 17.
(7) *Tara Rajaratnam* v. *Datuk Jagindar Singh, Datuk Suppiah and Arul Chandran* [1983] 2 M.L.J. 127.

CIVIL SUIT.

Subra Naicker for the plaintiff.
C. K. G. Pillay for the defendant.

Cur. Adv. Vult.

Shankar J.: The sole question with which this judgment is concerned is the measure of damages to be awarded to a purchaser arising out of a wilful breach of contract for the sale of land by a vendor. Counsel for the plaintiff contends that these damages should be assessed based on the value of the land at the date of the judgment. Defence counsel however submits that the crucial date for this exercise is the date on which the breach occurred.

The facts in so far as they are relevant are as follows. On December 26, 1969 the plaintiff, who is hereafter referred to as the purchaser, entered into an agreement in writing to buy from the defendant, hereafter referred to as the vendor, a piece of land held under Q.T. 65 for Lot No. MLO 2104 containing an area of 1 acre 1 rood and 16 poles situate in the Mukim of Sedenak, District of Kulai, State of Johore for the sum of $2,000. The land is hereafter referred to as the said land.